

STATE OF THE
JUDICIARY MESSAGE
JANUARY 2013

Governor Dugaard, Lieutenant Governor Michels, members of the Legislature, Constitutional Officers, my fellow Justices, Judges, UJS employees, and all citizens of the State of South Dakota.

Last year I ended my State of the Judiciary message to you with a discussion of a judicial gavel with a claw hammer on its head instead of a normal cylindrical head. It was given to me by a friend who said judges should use their authority to “build things.” His focus was correct. However, one should consider the judicial gavel as the beginning, not the end of a message. Today I would like to do that by talking to you about what programs the UJS is going forward with - programs which will improve our ability to serve the citizens of the State of South Dakota. This gavel symbolizes not an end, but a new beginning. It can start new programs, expand and improve existing ones, and complete others. A gavel sitting idle is useless. However, when put to use for the purpose it was designed, it becomes a powerful tool toward permanent progress.

“BILL”

For the past few years, I have talked about the importance of the courts protecting those who can least defend themselves. Those most in need of protection are children who are abused and neglected. Many are so young they cannot articulate the suffering that has been forced upon them.

Our system provides these unfortunate children with an attorney to protect them. Since the hope is that the parents may be rehabilitated and become worthy of the opportunity of child rearing, the legal path of these proceedings is often a long one. In the worst of the worst cases, there is no alternative for the best interests of the child than to terminate parental rights and place the child up for adoption or in a quality foster home.

In my opinion, attorneys who represent these kids are doing special legal work. They merit our appreciation. While some are more recent to the legal profession, others continue to participate because of the importance of the cause. The day Bill Janklow died last year, I was told by the Presiding Judge of the Second Judicial Circuit that Bill volunteered to take these cases in significant numbers. At the time of his death, he was involved in six of them. For a man who had reached the zenith of the legal profession and government service, to the end his priority was the smallest South Dakotans who were least able to defend themselves. He did not accept compensation for his services. Bill: “Well done thou good and faithful servant.”

SUBSTANCE ABUSE COURTS

My legal background is that of a prosecutor and circuit judge. In both professions I saw a substantial amount of crime. After several years, it became apparent to me that the

criminal justice system was routinely dealing with the same people over and over again. Nearly all of these repeat offenders were tied to crimes committed under the influence of alcohol or in an attempt to steal something to pawn or sell in order to purchase alcohol. Later came drug abuse where the same dynamics applied.

A revolving door also exists regarding substance abuse. It deals with families. After 37 years in the criminal justice system, I now see a third generation of certain families running afoul of our criminal laws.

As a circuit judge, I had basically two choices: either send the felons to the penitentiary or release them back into the public on some type of probation program. Neither seemed to me to effectively, nor permanently, deal with the underlying problem of alcohol and drug abuse.

Moreover, the problem remained and did not improve. When I was a circuit judge in the 1980's, there were 32 beds in South Dakota's women's prison. I never found it full. Today, South Dakota houses somewhere in the area of 450 female inmates. That is a 15 fold increase in about 20 years. The story for the men is basically the same. We have gone from 600 male inmates in 1980 to 3,600 today. Assuming no special needs, it costs around \$25,000 per year to house one inmate.

My personal experience and the South Dakota experience are consistent with what is occurring nationally. In the past 20 years, increased costs of incarceration have outpaced every other expenditure by the states. In large part that is because nearly 50% of those who are sent to prison for drug crimes will be arrested for another drug offense within a few years of their release. The revolving door and the State's open checkbook continue on and on.

After I became Chief Justice, I was approached by Judge Jerome Eckrich of the Fourth Circuit who proposed a drug court program in his circuit. My research showed me that every other state already had this program. South Dakota stood alone as the state that did not. We were able to create the Northern Hills Drug Court as an "experimental" program. Quite frankly, this program was a leap of faith because it had never been attempted in South Dakota.

To my delight the program showed signs of success from day one. In 18 months it had its first graduates who were sober, working full time, and maintaining a family home for their children instead of sitting in the penitentiary waiting to get out so they could get high again. These successful graduates to a person have told me it would have been easier to just go to the pen and do their time rather than submitting to the rigors of the drug court program. They proved with proper guidance they can rid themselves permanently of the curse of addiction.

In the next few years, we were able to expand this concept to include drug or alcohol courts in Pierre and in Sioux Falls. We enlarged the Northern Hills Drug Court to include the southern Black Hills. Tip O'Neill once said, "all politics is local." So perhaps is the

genesis of solutions. The movement came from the locale to fit local problems. In the process these local solutions became incubators for a potential state-wide response. Based on our existing programs, there appear to me to be three needs for success of this type of program in a community: (1) desire, (2) the ability to provide the needed services, and (3) funding. These locales are successful because they are able to meet these needs.

These are courts for addicts. Drug pushers, along with violent criminals, are not, and will not, be placed in a drug court program. For the safety of the public, they will be placed in the penitentiary. Some of the strongest advocates for the drug court program I have encountered are local law enforcement and prosecutors who have spent their entire careers dealing with the revolving door syndrome of crime based on addiction.

Last year, Governor Dugaard and this Legislature recognized the success of these South Dakota programs and invested a significant amount of money to expand them. This came late in the session and I did not get an opportunity to express my public appreciation for your action. Today I wish to thank you for your foresight and initiative. On July 1, 2012, we opened an alcohol court in Aberdeen and on January 2, 2013, we opened a drug court in Yankton. The existing programs have been strengthened and enlarged and we now have a statewide coordinator to provide assistance to the individual programs.

We now have five years of experience in operating drug and alcohol courts. During this time period, trends have appeared. The first is that our prison population has increased and will continue to do so in the future unless something of significance changes. The second is that these alcohol and drug courts work in South Dakota and represent an option to an increasing prison population.

In the past few years, there has been great debate over the allocation of state financial resources for K-12 education, higher education, and other fundamental services. However, if we continue to experience an increase in prison population and its corresponding costs, those debates are, in effect, meaningless because there will be no general fund dollars remaining to spend anywhere else than prisons. This is akin to a family budget dealing with five dollar a gallon gas. What is left?

After 27 years as a judge, I am not trading in my judicial gavel for a pack of "Get Out of Jail Free" cards. I simply am asking this Legislature, which sets the public policy, to take a look at these types of substance abuse programs as an alternative to more penitentiaries in appropriate cases. While it might be safer for me to simply sit back in my black robe and continue to oversee the UJS under a "Business As Usual" logo, there is too much at stake for us and future generations to take the easy path.

I was raised by a minister and a nurse. What would have been my fate if I had instead been raised by two meth addicts who could not shake that addiction? The fate of present and future South Dakotans hangs in the balance under the same dynamic.

The first time I met with then Governor-Elect Dugaard, he asked me to tell him about alternative sentencing. I did so. This conversation blossomed into a cooperative

effort which also included Legislative leaders. During the past year, with the assistance and input from distinguished South Dakotans, we prepared an extensive proposal for this Legislature to consider. We now have sufficient experience with these types of programs to consider the possibility of establishing them in every city in South Dakota that wants them and is large enough to provide support services, such as counseling, to make the local program successful. More successful programs will hopefully mean building fewer prisons housing fewer prisoners. While there are no guarantees such a new program will work flawlessly, to continue on "as is" is to guarantee an increasing prison population and an ever increasing depletion of the state treasury.

I am sure that a key question in your minds is what have we done so far to justify consideration of an expansion of this type of program? As of July 1, 2012, 41 persons have been successful and graduated from our substance abuse courts. Five subsequently committed additional felonies. Three more face felony charges. Thus, the program as of October 1, 2012, boasts an 88% success rate. Even if the charges against the additional three graduates become felony convictions, the success rate still stands at an impressive 81%. With 41 graduates and 62 current participants, there are 103 empty prison cells in South Dakota which would otherwise be occupied but for our substance abuse courts.

To return to my starting point: when I was a circuit judge, I had basically two choices for sentencing - either put somebody on probation or send them to the penitentiary. Now, there are other alternatives, including the drug court, alcohol court, and intensive probation. These are proven to work better to break the revolving door of crime with fewer tax dollars being spent. They give the sentencing judge tools in addition to the traditional penitentiary sentences and probation.

We have come to a fork in the road where we have to decide whether we will continue to be "tough on crime" in the same manner as we have in the past with ever-increasing rates of incarceration or be fiscal conservatives. As other states have found, we cannot be both.

I do not claim to have all the answers to this immense issue. Perhaps my thoughts are no more than an initial basis for discussion. As the great "liberal philosopher" Gen. George Patton once observed, "If everybody is thinking alike, nobody is thinking."

The ultimate decision will fall upon the Legislature. You set the public policy for this State's future through its statutes and appropriations for the operation of state government. My purpose is to raise the issue for public discussion. A previous President was fond of quoting the prophet Isaiah in such situations, "Come now, let us reason together..."

VETERANS

At the end of the horrific Civil War which took 600,000 lives, Abraham Lincoln, in his Second Inaugural Address, proclaimed the nation's duty to "care for him who shall have borne the battle and his widow and his orphan." As we continue with the longest wartime

period in this nation's history, we have 23 million veterans among us. For many, a return to civilian life has not brought prosperity. Thirty percent of people in homeless shelters are veterans. Seventy-six percent of those suffer from alcohol, drug or mental issues. Today, 18 veterans will take their own lives. There is nothing special about today. Yesterday, 18 veterans did the same. Tomorrow, 18 more will join them. We have lost more veterans to suicide than killed in action in both Iraq and Afghanistan.

With problems like these, all too many veterans find themselves under arrest and in front of a judge. The crime becomes a symptom of the underlying problem. Thirty-one states have started diversion programs to treat these underlying problems rather than proceed with criminal prosecutions. They are generically called "Veteran's Courts."

To ascertain the number of veterans who come through South Dakota's courts, I have asked UJS Magistrate Judges and probation officers to monitor the situation. Although the data is not complete, it indicates that there is a problem in South Dakota. While participants in drug and alcohol courts are exclusively felons, preliminary data indicates the veterans who come into our courts are mostly charged with misdemeanors. Because of their current lifestyle, veterans' future arrests are for the same type of violation. Once again, there is a revolving door.

We are engaged in planning a response along the lines of a "Veterans Court" program in South Dakota to make a positive difference. Initial discussions with the Veterans Administration and state agencies show promise of a cooperative effort in this area.

CAMERAS IN THE TRIAL COURTS

Last year, I discussed the new Supreme Court rule which allows still and video cameras in the trial courts of this state on a regulated basis. At that point, the rule was too new to give you any report as to how it would work. As I noted, "only time and experience will provide the answer."

A year later, we now have sufficient data to say that the rule definitely did not result in a de facto return to an outright ban of cameras in the trial courts. As of October 1, 2012, there were 61 requests made by the press for access. Forty-four requests had been acted upon. In seven cases, the judge and attorneys agreed to full access. In 21 cases, the judge granted audio access. Access was denied in 18 cases. This means that the press received access in about two-thirds of the cases.

We have not identified any structural defects with the rule. It is functioning as the Supreme Court intended. The determination of access is up to the attorneys and/or the judge based on the facts and circumstances of each individual case. I believe this continues to provide a fair balance between public access to the judicial proceedings and the right to a fair trial.

INTERPRETERS

As Chief Justice I get the annual reports from the judicial systems in all states and territories of this nation. This past year I received one from the Commonwealth of Puerto Rico. It was very professionally done by court officials who I know. Having had two years of Spanish in college I resolved to read it to see how I could do. After two pages I concluded I was unable to comprehend what I was reading.

If I, with a law degree, 37 years in the legal profession, and college Spanish, could not comprehend this judicial document, think how a person with little or no skills in English would do understanding the procedures and consequences of our legal system in South Dakota. For these individuals, interpreters are not a handy convenience. They are a necessity.

Last year this Legislature provided funding to upgrade interpreter services. We recognized that each judicial circuit has unique circumstances to deal with. We asked for a plan from each circuit to deal with its challenges. In rural areas of the state where access to interpreters is limited we are exploring ways to expand the access to interpreters through the use of ITV, a two way television system. This has been used for foreign languages as well as for people who are deaf.

We are also assisting those who act as interpreters. The UJS is working to create a statewide directory of those willing to offer interpreter services or resources. We have created a glossary of commonly encountered legal terms for purposes of translation and training for interpreters. As a guideline we are working on drafting an Interpreter Code of Conduct. In the near future, we hope to publish a handbook for interpreters that provides guidance to judges, attorneys, interpreters, and the public.

The UJS is creating signage to be posted in court houses indicating that language access services are available. Also expanding is the number of commonly used court documents translated into Spanish.

Why the emphasis on this area? Current data indicates 127 languages and dialects have been used in South Dakota courts. On a typical day in Minnehaha or Lincoln County an interpreter is needed an average of 4 times. At home, 6.8 percent of our population speaks a language other than English. That is roughly 56,000 people, and is equivalent to the third largest city in South Dakota.

DECLINE OF ACCESS TO ATTORNEYS IN RURAL AREAS

For the past several years I have talked to you about my concern about the decline of the number of attorneys in rural areas of the state. While it might appear to some that talking was about all that was accomplished, the time was well spent. It educated the citizens of South Dakota that there is a problem and the significant extent of it.

I strongly encouraged the formation of a partnership by the State Bar and concerned citizens who think the time for talk should yield to a time for action. A task force has been established to move forward. The task force brings together all those groups who have a direct and immediate stake in addressing this problem.

The task force has moved forward with a three point plan of how to proceed. The plan includes:

1. Providing resources to those law school graduates who wish to set up a law practice in a rural area.
2. Developing incentives, financial and otherwise, to encourage location in rural areas. This requires the local community to buy into the process. There is no way to drop a newly minted lawyer in its laps.
3. Bringing towns, counties, rural attorneys approaching retirement age, law school graduates, and the law school together with a website. Right now the process has the element of a junior high dance - the participants stand on the sidelines, lean against the wall, and look at each other.

To provide a central point of access for attorneys, counties, towns, law students and other interested parties, the State Bar has created a web site which may be found at <http://sdrurallawyer.com>.

Some say this is indicative of the problem of an overall decline in all facets of the rural areas in this state. To a point they may be correct. I am not advocating an attempted return to the "glory days" of attorney population of the 1950's and 1960's in these areas. We cannot resurrect the past. Rather, we need to realistically look at meeting current and future needs. There is no maintaining the status quo. With action the situation will improve; with inaction, it will continue to deteriorate.

Why should everybody care about this problem, whether they live in a rural area or not? Several years ago I had a discussion with a distinguished attorney from one of our larger cities. He told me, "For years we have been syphoning off as much business as we could grab from the smaller towns around us. We convinced their people to come to our city and spend their time and money here. The result? Now, there is nobody left in the rural areas because we sucked them dry. With nobody left out there, now it is our turn to pay the price."

A chain is only as strong as its weakest link. We have 66 counties and thus 66 links. Unfortunately all too many of the links are on the verge of breaking. Hopefully, our current legal system, which has served us so well, will not become a dinosaur lumbering off into oblivion.

SOFTWARE UPGRADE

In previous years I told you what the Unified Judicial System hoped to accomplish. This year it is my pleasure to tell you what we have accomplished. We continue to upgrade our entire software system.

As of October 1, 2012, three of the seven judicial circuits have converted to the new system. This includes the Second Circuit, headquartered in Sioux Falls, which contains over half the judicial records in the state. So far transition problems have been minimal and have been corrected. Overall, we are on budget and slightly ahead of schedule. We hope to have the remaining four judicial circuits converted by next summer and the entire project completed and functioning in about two years. The capstone of this project will include electronic filing and viewing of judicial records rather than the current laborious pouring through boxes of paper records.

Last year the Legislature authorized a modest increase in our search fee that guaranteed the fiscal solvency of our contractual commitment to this project. We are confident that this self-sufficiency will continue into the future.

BORN AND RAISED IN SOUTH DAKOTA

On this state occasion, I am going to talk about the South Dakota Constitution. You may assume there is a problem with it since much of what I have to say usually deals with problems. The good news is that there is not. It remains substantially the same document it has for decades. However, as Winston Churchill noted, "The farther backward you can look, the farther forward you are likely to see."

Very few people concern themselves with our state constitution. While public battles rage over the federal constitution's scope of our national government's authority over such issues as healthcare and immigration, our state constitution has a more significant daily effect on our lives.

Our state constitution gives us rights not addressed in the federal constitution. Our state constitution gives us the right to be compensated for either a taking of our private property or damage to it. The federal constitution only refers to an outright taking. In South Dakota, our land can only be taken for a public use by a governmental or quasi-governmental entity. At the federal level, private property can be condemned and re-sold to private third parties for a more lucrative private development. Thus, South Dakota farmers do not risk their farmland being taken from them for a strip mall.

Our state constitution vests the people with the power to elect its state judiciary. At the federal level, once confirmed, judges serve for life.

Our constitution guarantees this state's children a right to a free quality education. There is no such guarantee in the federal constitution.

The federal constitution authorizes an income tax, but places no limits on its extent. In contrast, our state constitution limits not only how much in tax dollars the state can raise, but also on how much it can spend. Our Legislature has never gone home without enacting a state budget and one that was balanced. We spend no more than we raise.

South Dakota is only one of five states that guarantee a litigant the right to appeal a judge's or jury's final decision to our state Supreme Court. In the other 45 states and United States Supreme Court, you have to get the court's permission to hear your case. The United States Supreme Court may get 8,000 requests a year to review cases and grants around 80. Your odds are not good. In South Dakota, our Supreme Court will receive 350 to 400 filings per year and review all of them. These appeals include everything from traffic tickets to the death penalty.

There are many other examples of rights we receive under our state constitution. The ones I enumerated are only a few examples of the rights and benefits the South Dakota Constitution grants us. It gives meaning to our state motto: "Under God the People Rule."

CONCLUSION

Today I have talked about abused children, persons addicted to drugs and alcohol, interpreters, and veterans who have fallen on hard times. As my hunter/philosopher friend Clarence observed, "As a society are we going to pick these people up or pick them off?"

While this State as a governmental entity has existed for 125 years, on this grand stage we, as individuals, are merely passing through. The Book of Ecclesiastes declares, "To every time there is a season." Our time here is short. As with the first South Dakotans in 1889, we must join every succeeding generation of citizens who have had to face the daunting question, "Do we want to pass on to our children our accomplishments or our problems and our failures?"

Respectfully submitted,

David Gilbertson
Chief Justice